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IN THE MATTER OF the HUMAN RIGHTS CODE, 1981 S. O. 1981 chapter 53 as amended

AND IN THE MATTER OF the complaints of Helen Newman, Annie Roach, Ada Petre and Olga Crouse that F. W. Woolworth Limited, its servants and agents and Mr. D. Rosano, Warehouse Manager at F. W. Woolworth Limited at 2277 Sheppard Avenue, Weston, Ontario, discriminated against each of them on the basis of sex in contravention of section 4(1)(c)(g) of the Ontario Human Rights Code, R.S.O. 1980 chapter 340, as amended

AND IN THE MATTER OF the complaint of Reva G. Landsberg that the said F. W. Woolworth Limited and its servants and agents and the said D. Rosano discriminated against her on the basis of sex and age, in contravention of section 4(1)(e)(f)(g) of the Ontario Human Rights Code, R.S.O. 1980 chapter 340 as amended.

DECISION OF THE BOARD OF INQUIRY

Chairman	Paula Knopf
Dates and Place of Hearing	June 3, September 17, 18, 19, 20, 24, 26, December 6, 11, 13, 16 and 19, 1985 in Toronto
Appearances	Hal P. Rolph and Catherine Osborne for the Ontario Human Rights Commission Susan Bazilli for the Complainants Paula Rusak and Mary Ellen Cummings for the Respondents

INTRODUCTION

This case involves five female complainants who allege discrimination on the basis of sex in contravention of paragraph 4(1)(g) of the Ontario Human Rights Code, R.S.O. 1980 chapter 340 as amended, against the corporate respondent F. W. Woolworth Co. Limited (hereinafter referred to as Woolworth's) and Mr. Donald Rosano. Mr. Rosano was at all material times the manager of the operation where the complainants worked. In the course of the proceedings, the Commission and the complainants indicated that, on the basis of the evidence adduced, the complaint was being withdrawn against Mr. Rosano personally. Thus, before the hearings were completed the action was dismissed as against him and this decision confirms that. In addition, it should be pointed out that although the original complaint did allege discrimination on the basis of age in contravention of the Code, the hearing proceeded on the allegation of the claim of discrimination on the basis of sex alone.

Prior to the commencement of the hearing, one of the complainants, Annie Roach died. However, the claim was pursued on behalf of her estate. Woolworth's quite fairly took the position that her case could proceed in this matter and, in the event that any compensation or damages would have been awarded to Mrs. Roach, the respondent had no objection to those being made payable to the estate. Thus, although we were not able to hear any evidence on Mrs. Roach's claim directly, her claim proceeded before the Inquiry on the same basis as the other complainants.

Woolworth's operates a number of retail outlets and warehouses throughout the Province. In the location in question, it operates a warehouse and distribution centre for its merchandise. In particular, the operation consisted of a warehouse employing approximately 200 people as well as

offices staffed by approximately 70 people. The complainants all worked within the office fulfilling various clerical functions. There is no question that the people who worked in the office are almost exclusively female while those who work in the warehouse are predominantly male. It is also clear that most, but not all, of the managerial functions of the operation are held by males.

The situation that gave rise to the complaint was Woolworth's decision with regard to the implementation of the annual wage increases in February, 1982. Wage increases in varying amounts were granted to the staff at the operation at that time with the exception of the five complainants and one other female employee. Instead of receiving wage increases as did their fellow workers, those six individuals had their wages frozen. The complainants allege that Woolworth's decision to freeze only their wages had the effect of discriminating against them on the basis of their sex because only female employees had their wages frozen. On the other hand, Woolworth's contends that there were sound managerial reasons behind the decision to freeze the wages that do not in any way include discrimination, and further that it cannot be said that sexual discrimination exists when only six of over sixty female employees did not receive a raise.

The hearing of these complaints lasted for twelve days, including two days of legal argument, numerous witnesses and 32 exhibits. Despite the length of the hearing and despite the fact that the issues raised by the complaints are both important and interesting, there is very little factual controversy between the parties. With few exceptions, the task of the Board of Inquiry was not to determine the credibility of the witnesses but instead to determine the importance and the implications of the evidence given by the witnesses. Where there are factual matters that cause controversy and need to be resolved, they shall be shall be dealt with specifically in the award.

THE FACTS

As mentioned above, all the complainants worked at a distribution centre located on Sheppard Avenue West in Weston. The centre can be divided in terms of a warehouse and offices. There are additional internal subdivisions between staff who are designated to certain divisions within the Company. For example, the complainants Landsberg, Crouse, Newman and Roach all work in the Company's "9000 office", whereas the complainant Ada Petre works for the "9001 office" in "Department #60". Despite these designations, the complainants work within close physical proximity and are all covered by the same payroll organization, management and managerial practices.

Many of the witnesses who testified had been with the Company for long periods of time. Some had been with the Company for as long as twenty years. The evidence is clear that the Company had a practice of granting an annual wage increase to its staff at this location every February. In some years, the Company had even granted increases twice a year. Thus, employees came to expect that they would receive and enjoy at least one wage increase in February of each year.

In January of 1982, all supervisors, department heads, foremen, material handlers 1 and 2, merchandise markers, maintenance cleaners and "re-buyers" were notified by way of a memorandum posted on the bulletin boards that they would receive an increase of up to five per cent with a maximum of 50 cents per hour effective February 1, 1982. Those categories basically included all managerial and warehouse staff.

The complainants Crouse, Newman and Roach together comprised the Payroll Department. At the end of January, 1982, they were in the process of preparing the documentation and the paper work necessary to implement the salary adjustments for the managerial and warehouse staff as mentioned above when Mr. Rosano came into their office accompanied by Mr. McLennan. Mr. McLennan was the Assistant Personnel Manager at that time. It is clear that Mr. Rosano asked the staff whether the managerial and warehouse adjustments had been completed and was told that they were almost done. Mr. Rosano was then asked if he had the figures ready for the Payroll Department to process the increases for the office staff. It is at this point that some controversy develops in the evidence.

The evidence of Mrs. Newman and Mrs. Crouse suggests that Mr. Rosano advised them that they and Mrs. Roach would be three of six senior female employees who would not be receiving a wage increase. Mrs. Newman recalls Mr. Rosano saying "I must tell you now, that there will be six female employees who will not receive the increases, and among the six there will be the three of you." Mrs. Crouse recalls the same announcement with less precision but attributes Mr. Rosano as saying, "By the way, I should tell you ladies now that there will be some wages... some will be getting less, some will be getting more, and there will be six senior ladies... their salaries will be frozen... The three of you are part of that six."

Mr. McLennan strongly denies that Mr. Rosano told the Payroll Department that six "female employees" would have their salaries frozen. Instead, Mr. McLennan says that Mr. Rosano said six "senior office employees were being frozen based on a job evaluation." Mr. McLennan is sure that Mr. Rosano did not mention the word "female".

Mr. McLennan says that he would have reacted himself at such a statement in the same way that he would had Mr. Rosano made a statement that "six black or six East Indian employees were to get a wage freeze. Mr. McLennan could not recall if Mr. Rosano used the word "ladies". Mr. Rosano's memory of events was not as precise as any of the other witnesses. There were many inconsistencies between his evidence and that of Messrs. Delvecchio and McLennan. For example, Mr. Rosano at one stage suggested that the freeze was imposed before the results of the survey were obtained. However, it is clear from Messrs. McLennan's and Delvecchio's evidence that the results of the office suevey had been obtained when the decision to impose the freeze was made. This may well be due to the fact that between 1982 and the present Mr. Rosano suffered a serious heart ailment which required him to retire. It should be said at this point that he was unable to recall many of the details of the surrounding events, but, given his health condition and his demeanour, this Board did not detect any attempt to evade the issues or deny facts within his recall.

Thus, the Board was in essence left with the dispute between the evidence of Mr. McLennan and Mesdames Crouse and Newman on this issue. It can be said at this time that the conclusion that must be drawn on the basis of all the evidence is that Mr. Rosano did indicate to the Payroll Department that six female employees would have their wages frozen. He did this either by referring to them as "females" or as "ladies". However, in fairness, this must be viewed in the context of the work environment itself. Mr. McLennan in his testimony often referred to the complainants as "ladies". The complainants themselves referred to the office staff as "girls." Finally, throughout the proceedings, the office staff was continually being referred to by witnesses as "the women" in the office and warehouse staff was referred to as "the men". However, it is clear that at the relevant times

there were men working in the office and women working in the warehouse. Thus, it is more likely than not that given the environment and the jargon in the office, Mr. Rosano would have referred to the six employees whose wages were frozen by their gender. Thus, it is concluded that he referred to them as females or ladies.

In any event, the conversation between Mr. Rosano and Mesdames Crouse, Newman and Roach continued when Mrs. Crouse asked Mr. Rosano whether another member of the office staff, namely Walter Ciafardoni, was having his wages frozen. Mr. Ciafardoni earned more than the the people in the Payroll Department and was considered part of the office staff for purposes of payroll. Mr. Rosano advised that Mr. Ciafardoni's wages were not being frozen. The meeting with the Payroll Department ended with Mr. Rosano promising to have the exact figures for the annual raises available to the department within a very short period of time for them to process for the rest of the office staff.

As it turned out, three other employees within the office staff had their wages frozen. The other employees were Reva Landsberg from the Adjusting Department and Ada Petre who worked in the Distribution Office. The sixth person to have the wage freeze imposed upon her was Alice Johnson. She was the secretary to Mr. Rosano and chose not to lay a complaint. Mrs. Landsberg was informed of her freeze when she was called into Mr. Rosano's office and advised of her wage freeze by being told, "Your wages are being frozen... It's not anything to do with your work... We are satisfied with your work ... but as you know sales have been down this last few months... If business picks up within six months or so we could make an adjustment." When called into Mr. Rosano's office Mrs. Petre was told that she would not be getting the increase that year because "I was

getting too much money for the job I was doing... I was getting enough pay for the job I was doing."

Not surprisingly, those who had their wages frozen were upset. This is particularly not surprising given the fact that three of the six made up the entire Payroll Department and had the task of processing the increases for virtually everyone but themselves. It is clear that the complainants did not feel that they had been given an adequate explanation as to why their wages had been frozen. Mrs. Newman pursued this by sending letters to Mr. Rosano demanding explanations. The complainants were clearly not happy with the explanations given to them by Mr. Rosano or contained in the notice of salary adjustments that had been posted to all secretaries, accounts payable, distribution office, shipping, store adjustments, receiving and order assembly staff. That notice read:

> 1982 SALARY ADJUSTMENTS
>
> A 5 - 8% salary increase will be in effect as of February 1, 1982.
>
> It was our hope to include the categorization with this increase, however, further details require completion and should be in effect very shortly.
>
> Should the present economic conditions prevail in 1982 the above increase will hold for the year. We will be reviewing this condition as the year progresses.
>
> Job evaluations had been made and the result of our finding reveal [sic] some areas have reached the level whereby the salaries of some will be frozen and not be affected by the above increase.
>
> This is not a reflection on the individual and the quality of work being performed, but rather a condition of the value of the jobs involved. We must be careful not to

outprice our operation, therefore, we hope you will understand the action taken.

"D. R. Rosano"

Mrs. Newman's attempt to get an answer or further explanation from Mr. Rosano was delayed by Mr. Rosano taking a holiday soon after the announcement, but she did receive a reply on March 3, 1982. That letter reads as follows:

Dear Mrs. Newman:

Please refer to your letter of February 10, 1982 document #0537C.

Your letter has left me with the opinion that you had completely missed the context of the meeting. First, the bottom line is that the wage freeze was the result of evaluating the jobs being performed and the salaries paid. Under no circumstances was the wage freeze reflective of the individuals involved and/or the quality of work performed. It was simply the case of the salaries paid were beyond the value of the job performed. Re-classification of jobs did not enter into the picture, also, the freeze, as indicated at the meeting, will be indefinite.

Your letter states that I informed you that six senior employees were involved. On he contrary. I did not reveal to you or any of the other employees who was involved.

Finally, I wish to state that I have always been and always will be receptive to hear all employees [sic] comments. This "open door" policy includes yourself and as the above situation is of a local nature it is not necessary to formally request a meeting in writing in order to discuss any questions you may have. Should you wish to

pursue the subject further simply advise me as to your availability for a meeting.

Yours truly,

"D. R. Rosano"

A meeting was held between Mr. Rosano and Mrs. Newman that did not satisfy Mrs. Newman in any way. Mrs. Newman recalls Mr. Rosano mentioning that the Company was concerned about not wanting to outprice the operation and an argument ensued over whether the "men in the warehouse" were being overpaid. The result of the unsatisfactory meeting and the situation as a whole was that these complaints were filed with the Human Rights Commission.

The feeling of the complainants was most eloquently summarized by Mrs. Crouse when she said that the announcement of her freeze left her dejected. She said, "I did everything that I was asked, in fact I did more ... All those years, besides watching these young men work there and get raises... I felt, okay, I do my job and I'm getting my raises so I am satisfied. But when this came up, and now you see a person who has less seniority, less responsibility, less skills, less everything... He is getting a raise and I am not. So then I thought there has to be a principle somewhere here."

In this context, it should be noted that all the complainants are long-term employees. Mrs. Crouse has worked for the Company since 1969. Mrs. Newman began part-time with the Company in 1966 and full-time in 1968. Mrs. Landsberg worked from 1956 to 1959 and returned as a permanent employee in 1963. Mrs. Petre worked from 1954 to 1957 and then returned in 1964 until her retirement in 1982.

The complainants clearly feel that one explanation, if not the only explanation for why they did not receive the

wage increase in 1982, was that they were females. They see this as the result of systemic discrimation practised by Woolworth's against females as part of an advertent or inadvertent corporate policy. They allege that proof of this comes in many forms.

First, the complainants raise a comparison between themselves and Peter Sandford and Walter Ciafardoni. These two men are considered as part of the office staff for purposes of payroll. The both earned more than any of the complainants in 1982 and both received increases in February of that year. Both had originally worked in the warehouse and had moved to the office taking with them their warehouse salaries and benefits. Mr. Sandford's function as traffic co-ordinator was to co-ordinate deliveries with suppliers by scheduling trucks in and out of the warehouse with the assistance of a computer. This amounted to the co-ordination of 75 trucks daily. Mr. Ciafardoni's job was to take care of internal mail delivery throughout the warehouse and the office. He also worked with the assembly of orders and the servicing of the photocopy machine. His equipment consisted of a golf cart or a flat bed truck. The complainants feel that they all exercise more responsibility and independence than Messrs. Sandford or Ciafardoni and yet complain that they earnd less money and received no increase in 1982.

Next, the complainants allege that the freezing of their wages was consistent with previous corporate policy that discriminated against women. One example they cite is the Company's policies with regard to Christmas bonuses. Mrs. Newman and Mrs. Crouse explained that prior to 1975 the Company had a policy of giving men with more than twenty years' service a small cash bonus at Christmas time in addition to their regular Christmas bonus cheques. The cash bonus was based on the number of years' service above twenty. It was the complainants allegation that the same policy was

not extended to women. The matter seems to have become a controversy in or about 1974. Mr. John Petre, the husband of the complainant Ada Petre was the Personnel Manager for the operation from 1974 to 1979. He had been enjoying the Christmas bonus while he was assigned in the warehouse. However, when he was promoted to the office staff as Personnel Manager and came into the office, he lost the bonus. According to the Company witnesses and as verified by the complainants, no one in the office received the cash bonus. In fact, Mrs. Crouse admits that there were two men who worked in the office in addition to Mr. Petre who had greater than twenty years' service who had not received the bonus. In 1975, a corporate decision was made to extend the cash bonus to not only the men and Mr. Petre who were working in the office but all other employees in the office with greater than twenty years' service, which included any females in that category. Thus, it cannot be said that the policy discriminated on the basis of sex. The different treatment was based solely on the locale where the individual worked.

Another aspect of historical or systemic discrimination that the complinants cited was the Company's policy with regard to group life insurance. Prior to 1980, a group life insurance plan was only available to warehouse or managerial employees according to the terms of the plan itself. However, if a person moved from the warehouse into the office, that person was able to keep the benefit of the group life plan. The complainants alleged that this amounted to effective discrimination in that the warehouse employees were almost exclusively men whereas the office employees were almost exclusively women. It was not until 1980 that a corporate decision was made to obtain and accord to employees in the office a group life insurance plan to cover all office employees, including women.

A final aspect of "differential treatment" alleged to this Board dealt with days off at Christmas time. Prior to 1981, the Company had given the office staff a half day off with pay during November to enable "the women" in the office to do some Christmas shopping. The office staff was also allowed an extended lunch time for a Christmas party. The warehouse staff was not given this privilege and began to complain. Management responded by indicating that it was compelled by law to treat all employees equally and thus removed the half day shopping and extended lunch hours as benefits for the office staff.

The evidence cited above puts the complainants' situation and reason for their complaint in the context of how they perceived their working environment. However, it does not give a complete picture. The evidence of the respondent was offered to establish the financial and organizational reasoning behind the decision to impose the wage freeze as it did in 1982.

The Company's main witness was Mr. Donald Delvecchio. He was the Personnel Manager at the operation in question from 1979 to 1981. At that point he became the Industrial Relations Manager for the Company and was transferred to the head office in downtown Toronto. He explained that the employees, through an employees' committee, had voiced dissatisfaction over the wages and wage structure in the office in the year or so prior to 1982. Employees were concerned with disparities between staff in the office who were receiving very different amounts of wages and yet were doing very similar work. Also, there was dissatisfaction with the fact that there was no certainty or way for foreseeing progression whereas employees in the warehouse received increases based on a preset grid. Thus, the employees' committee suggested that a classification or grid

system similar to the warehouse be created in the office to address some of these concerns. Mr. Delvcchio says that this expression from the employees' committee prompted management to begin to "look at the commonalities of jobs" and to approach employees and the supervisors to determine job descriptions and commence a reorganization of the wage structure. Also, it prompted a wage survey to be conducted in November and December of 1981 of the office jobs to obtain a comparison of what Woolworth's was paying at a sister location as well as what the competition were paying for similar jobs elsewhere in Metropolitan Toronto. While it seems that it was common practice for a survey of the competition to be done for warehouse salaries, this survey seems to have been the first that was done for the office staff. Thus, at the end of 1981, we have the Company undertaking a study of the office staff with the avowed object of trying to create internal parity of wages within its own staff and also comparison with what the competition were paying for similar jobs.

The survey of the competition and sister locations was done by Mr. Delvecchio and Mr. McLennan. By their own admission the survey was very informal. They set up "generic job descriptions" covering the clerical aspects of the office staff. None of the positions to be surveyed would have included any of the managerial staff, any of the "rebuyers" or Mr. Sandford or Mr. Ciafardoni. In fact the "generic descriptions" only applied to positions held by females. According to Mr. Delvecchio the generic descriptions were drafted together with Mr. McLennan at a table. According to Mr. McLennan the descriptions were arrived at via telephone. This inconsistency is rather trivial in light of both gentlemen's admission that because there was no clear job descriptions available for these clerical positions, it is quite possible that they may have had different things in mind and different standards when they conducted the survey

themselves. Thus it was not a very scientific or well run survey.

In any event, Mr. Delvecchio and Mr. McLennan proceeded to telephone various competitors to determine the job rates that were being paid for similar jobs to those at Woolworth's.

Mr. Delvecchio justifies not conducting surveys on Mr. Ciafardoni's or Mr. Sandford's jobs on the basis that Mr. Delvecchio did not consider those jobs as being office jobs and thus not to be included within the office survey. Mr. Delvecchio further said that these men did not ask to have their jobs classified as had the rest of the office staff. Mr. Devecchio suggests, "If they had, perhaps I would have included them in my list at the time." Mr. McLennan on his own seems to have tried to have gotten a comparison with Mr. Sandford's wages because it was hoped that a similar position of traffic co-ordinator might have existed at Eaton's because of its size. However, in conducting his survey of the competition Mr. McLennon was not able to find a company that employed a person with the same kind of duties as Mr. Sandford. Mr. McLennan admits that he did not even turn his mind to Mr. Ciafardoni's position because he considered him as really part of the warehouse and not part of the office.

After surveying the competition, Mr. Delvecchio explained that management concluded that they were paying lower than average wages in the junior positions and higher than average in the senior positions. The Company felt that with regard to the junior positions, they were paying lower than the position they wanted to maintained vis-a-vis the competition in the labour market. Conversely, in the higher paying and senior jobs, they were paying higher than the position they wanted to maintain. Thus, Mr. Delvecchio said

the decision was made to take measures to bring "the bottom up and keep the top from going too far out of whack." Further, the decision was made to red-circle some positions. This was said to be designed to enable some people in some of the categories to catch up and eliminate disparities.

The Board was never told clearly or directly who exactly made the decision to impose the wage freeze or how it ought to be applied. Mr. Delvecchio described a management meeting attended by Mr. Socket a Company Vice-President, a Mr. Andrews, Mr. Rosano and himself where the whole issue was discussed. Mr. Delvecchio had the responsibility of assisting and preparing this case for hearing and he admitted that at the end of his investigation and preparation there was some "ambiguity" in his mind as to who had actually made the ultimate decision. As he understood it, after the managerial meeting and the results of the survey were discussed, Mr. Andrews and Mr. Rosano were left to review the wage increases for the office. Mr. Rosano recalls being told by Mr. Andrews to grant an increase of five to eight per cent to the people in the office earning less than $300.00 but to freeze the wages of the people in the office over $300.00 to eliminate the disparity. However, Mr. Rosano does not know if Mr. Andrews was the person who in fact made the decision. Mr. Andrews was not called to testify by the Company. The Board was told that Mr. Andrews is no longer in the employ of the Company but was offered no further explanation for his absence other than the suggestion that he is a "world traveller". As far as the Board is aware, no attempts were made by the Company to produce Mr. Andrews.

A great deal of controversy arose at the hearing regarding the question of how much credibility ought to be given to the survey or the survey itself. This arose partly because the complainants were completely unaware that a

survey was being conducted in late 1981 or early 1982. Further questions were raised by the fact that the notes regarding the survey were not produced to the complainants during the Commission's fact-finding process or until midway through the proceedings. The Company's explanation for this is twofold. Firstly, it admitted that the survey itself was very informal and was only recorded by Mr. Delvecchio and Mr. McLennan by way of handwritten notes to themselves that were transmitted to the rest of management in a similar informal manner. Further, these notes were not even found in their entirety due to disorganization until midway through these proceedings. Finally, Mr. Delvecchio admitted that what notes of the survey were in existence during fact-finding were withheld because the Company "wanted to keep an ace up its sleeve".

There is no question that the circumstances surrounding the notes of the survey and their belated production resulted in a great deal of controversy at the hearing and protracted the argument and the proceedings considerably. However, at the end of the day, the veracity of the notes of the survey produced by the respondent was not challenged by the Commission or the complainants. Finally it is to be noted that the Commission's investigator, Ms. Bernhardt had been given the results of the survey orally by the respondent during fact-finding and was able to confirm those results as being accurate. Thus, despite the controversy the Board is able to find as a fact that the office survey was done as alleged by the respondent and the conclusions drawn by the respondent were justified on the basis of the data it received with regard to its competitive position.

A much more formal survey was conducted of the warehouse in preparation of the 1982 salary increase. The conducting of the warehouse survey was an annual practice.

The warehouse survey indicated to management that they were paying more at the top rate of some jobs and again paying low at the low rate. In that case, the Company decided to allow a five per cent raise up to a fifty cent maximum to "keep things from going through the roof" with regard to the top-rated jobs. Mr. Delvecchio says there was no need to impose a freeze in the warehouse because everyone was doing the same jobs at the same rate and there was not the same concern about internal disparity as was felt in the office.

In response to the evidence adduced by the complainants suggesting "systemic discrimination and employment practices", the evidence of the respondent was designed to raise counter indications. For example, the respondent's evidence discloses that female employees have managerial positions and in one case exercise control over males. In addition, Mrs. Crouse was approached in 1980 and asked whether she wanted to be considered for the position of Assistant Personnel Manager and thus gain a promotion. At the time she declined but was approached later on and was asked whether she wanted to then become the assistant to Mr. McLennan when he became Personnel Manager. When Mrs. Crouse realized that this would only be a clerical position, she had no interest in that job although she had prepared herself through a community college course to take on the position of an Assistant Personnel Manager. While there may well have been an unfortunate misundertanding between management and Mrs. Crouse as to what positions were available or were to be made available to her by 1982, it must be concluded that she was actively and seriously considered by management at some point for advancement into a managerial personnel position.

Other counter-indications of systemic discrimination that the respondent's evidence offered were the fact that in the categories where males and females are doing the same

work, the employees are all paid at the same rate. Further, when Mr. McLennan first began as Assistant Personnel Manager in 1981, although he was a junior employee he was considered managerial and yet he earned less than Mrs. Crouse or Alice Johnson although he was working a forty-hour week as opposed to their thirty-five hour week.

Finally, in order to understand the context of the 1982 wage rates, it is helpful to view the salaries of the complainants together with their co-workers in each category as well as Messrs. Ciafardoni and Sandford. The following chart is based on payroll's organization of the staff departmentally. Only relevant departments are included. All employees worked 36 hours except those who worked 40 hours and are designated by (40). The designation (C) indicates the complainants. (The confidence of other employees has been preserved by referring to them by initials only except where names are essential to an understanding of the evidence.)

9000 Office Staff

	1981	1982
Rebuyers - Dept. #1		
Manager (40)	$525.20	$545.20
Employees - Re-buyers (40)	493.60	513.60
Peter Sandford (40)	462.80	482.80
Adjusting Dept. #4		
Reva Landsberg (C)	312.56	312.56
R.D.	175.30	184.07
M.W.	262.78	275.92

Payroll Dept. #5		
Ollie Crouse (C)	376.23	376.23
Helen Newman (C)	343.81	343.81
Annie Roach (C)	334.90	334.90
Store Sorting - Dept. #9		
Walter Cifardoni (40)	450.80	470.80
9001 Warehouse - Office		
Manager	462.80	482.80
E.C. (40)	176.95	218.59
K.D. (40)	202.36	212.47
A.H.	265.78	278.54
P.H.	173.95	182.65
C.J. (40)	232.19	276.50
P.K.	232.19	243.80
M.M.	298.57	311.40
Ada Petre (C)	329.92	329.92
S.S. (40)	200.34	210.35
M.W.	205.99	216.30
4000 Warehouuse		
Office - Department 52		
Margaret Hurst (32 hours)	300.98	325.00
D.M. (40	210.00	222.60

R.Y. (40)	189.00	212.00
C.W. (40)	205.00	215.25

THE ARGUMENT

Final submissions regarding the facts and the law of this case took two full days. It is neither possible nor necessary to reproduce the details of the arguments in full. However, the following represents the main thrust of the parties' submissions and their most persuasive arguments.

Submissions Made on Behalf of the Human Rights Coommission

Commission counsel argued that the respondent's actions constitute a violation of section 4(1)(g) of the Code. It was said that the facts establish a practice of granting at least one annual wage increase for as long as any witness could remember. A freeze imposd in 1982 was the first time such an action has been taken by Woolworth's and it was imposed only on six employees who were female. No man was subjected to a wage freeze, notwithstanding the fact that males far exceed females in numbers in the operation and make considerably more money than the females. Further, while the complainants were subjected to the freeze, they were long-service employees, employed in confidential capacities who were called upon to exercise judgment and who were accepted as trustworthy, capable and competent members of the staff.

It was argued that Woolworth's contention that the wage was imposed as a cost-saving measure ought not to be accepted because the cost-saving in the annual budget amounted to only $4,347.32 for the five complainants out of an annual budget of $5,837,676.00 or a "saving" of

approximately .0007%. If only the office budget is considered rather than the office and warehouse combined, the "saving" would be out of a budget of $950,092.00 or .0045%.

Thus, it was argued that the freezing of the wages of the women only amounts to prima facie discrimination because the women were treated differently than the men in a detrimental way. The position of the complainants was compared to that of the workers in the warehouse where the vast majority of the persons employed there were male. The wage survey done in preparation for the warehouse annual increase indicated that Woolworth's was paying higher in the classification such as material handler and was concerned about maintaining a competitive position. So it was decided to put a cap on the increase and yet to grant an increase of five per cent or up to a maximum of $20.00 per week. On the other hand, the vast majority of the employees in the office were female. A survey was initiated in the fall of 1981 as a result of employees' concerns over the fact that the office employees were not classified or able to progress and for the warehouse employees. The survey that was conducted in the office was not nearly so systematic or organized as that prepared for the warehouse. It was pointed out that the only persons who could be affected by the office survey were women and thus the results of the survey could only impact upon women. It was argued that the office survey was "much less rigorous and systematic" than the warehouse survey and that this alone amounts to prima facie differential treatment and thus discrimination.

It was also submitted that the evidence of Mr. Rosano ought to be considered significant in that he indicated that he was never consulted with regard to the advisability of imposing a wage freeze on the complainants and yet he was in charge of that location.

Commission counsel stressed that the respondent's evidence ought to be considered "disturbing and disconcerting" regarding the conflict and gaps in its evidence. For example, the difference between Mr. Delvecchio saying that the results of the survey were presented to a meeting with Messrs. Socket, Andrews and Rosano, whereas Mr. Rosano testified that they had not received the results of the survey when the decision was made to impose the freeze. Further, it is left unclear from the respondent's case as to who actually made the decision to impose the freeze. This coupled with the failure to discuss the decision with Mr. Rosano was said to be consistent with a view that downgraded and minimized the value of the work done by the women.

Commission counsel also cited internal inconsistencies in the respondent's evidence especially between the evidence of Messrs. Delvecchio, McLennan and Rosano regarding the preparations made for the survey of the office workers and the use made of the results. Counsel suggested that Mr. Delvecchio's evidence was evasive and indicative of an attempt by the respondent to obscure the true decision-making process.

Commission counsel also submitted that if the decision to freeze the complainants' wages was taken for non-discriminatory reasons, it ought to be a very easy task to answer the complaint. All that would have been required would have been to put a witness forward from Woolworth's who could have said that he made the decision and why. The failure to produce such a witness by the respondent ought to result in an adverse inference being drawn against Woolworth's.

It was also submitted on behalf of the Commision that Woolworth's has demonstrated a history of discrimination

against women with regard to the rewarding of Christmas bonuses only to men until 1975 and the provision of group life insurance benefits only to men until 1981. This was said to indicate Woolworth's tolerance and sanction of differential treatment of men and women.

Counsel urged the Board to conclude that the intent and the effect of the respondent's conduct was to discriminate against the women.

By way of remedy, the counsel asked for damages for each of the complainants based on a loss of the five per cent increase in 1982. The actual wages lost to the complainants in 1982 would have been $4,347.32. Compounding those losses and considering the employment records of the complainants to date, the amount claimed for the individual complainants would be:

Crouse	$4,034.16
Newman	3,153.52
Landsberg	2.009.44
Roach	1,084.69
Petre	792.00

Interest was also claimed on those amounts.

In addition, the Commission sought damages for the hurt feelings, frustration and embarrassment occasioned as a result of the freeze. Five thousand dollars for each complainant was sought.

Third, it was requested that the respondent be required to provide the complainants with a letter of apology for the Company's action and that the apology be posted to come to the attention of other workers. Finally, it was submitted that the Company ought to be required to take

remedial actions to avoid similar problems in the future by working together with the Commission.

Submissions made by Counsel on Behalf of the Complainants

Counsel for the complainants echoed and supported the submissions made on behalf of the Commission but made additional comments as well. This Board was urged to be mindful of the fact that Human Rights legislation was intended to erase discrimination and ought to be read to give full effect to the public policy cocerns of the Code. It was said that the essence of this case is that Woolworth's decision had a disproportionate effect upon the complainants. It was submitted that the evidence establishes that the complainants were "singled out" for the wage freezes and that the respondent's evidence ought to be considered as an "after the fact" attempt to justify a discriminatory decision. The alleged conscious decision to freeze the wages of only women was said to be prima facie discrimination. The fact that two men who could have been effected by the freeze, i.e., Ciafardoni and Sandford, and yet were excluded from the freeze was said to indicate again that the respondents had singled out these complainants and thus discriminated against them. Finally, it was said that there is no reasonable or rational explanation offered by the respondent to explain the decision to freeze that is inconsistent with discrimination.

With regard to remedy, counsel for the complainants sought the same remedies mentioned by counsel for the Commission. However, in addition, it was submitted that the respondent be required to communicate to the complainants an explaination as to why their wages were frozen at that time.

Submissions made by Counsel for the Respondent

It was submitted that the Commission and the complainants had not established a prima facie case of discrimination. Instead, it was suggested that the Commission's case was really a misplaced plea for equal pay for work of equal value. Further, it was submitted that the facts established that the office survey came about as a result of Mr. Delvecchio being approached by an office committee composed of some of the complainants. They wanted a grid established like the warehouse and internal parity in wages. Once management began to survey and study the situation, it became aware that internal disparities existed, junior employees were being paid much less than senior employees for the same work and senior employees were receiving wages that were comparitively higher than the competition. Thus, the decision was made to red-circle the wages of employees who were earning appropriate amounts of wages and to begin taking steps to produce a grid for employees similar to that already established in the warehouse.

As a result of the survey, the office workers received wage increases of five to eight per cent (with the exception of the complainants) and the inequities began to be adjusted.

Counsel for the respondent stressed the non-discriminatory and the "fair" aspects of Woolworth's employment practices. For example, out of 68 women employed at the location, only six did not get an increase. All women working in categories or classifications with men got identical increases. In one category of "merchandise markers" in the warehouse, all the employees in that category got an increase even though their rates were higher than the

competitors', and even though all the positions were held by women. Further, some of the women in the office staff got increases of greater than five per cent in 1982, whereas the men in the warehouse had their increases limited to five per cent. Simailarly, in Department 61, two women got increases of nineteen per cent whereas the men were limited to five per cent.

Counsel submitted that in assessing the evidence and the background to the case, the Board ought to take into consideration the fact that red-circling is a common practice in labour relations that is invoked especially to redress disparities within the labour force.

Counsel for Woolworth's responded to the issues raised with regard to the positions held by Messrs. Ciafardoni and Sandford as compared to the complainants by reminding the tribunal that this is not an "equal pay" case and that there was not sufficient evidence adduced to enable the tribunal to assess the relative worth of the two jobs. The evidence established that there was not a similar job to Mr. Ciafardoni's in the competition and thus comparisons were impossible.

With regard to the alleged similar fact evidence helping to establish a prima facie case, counsel for the respondent argued that the evidence is not relevent and that a prima facie case must be made out first before such evidence would ever be considered. But primarily, counsel argued that the evidence regarding group life and Christmas bonuses does not establish discriminatory or differential treatment. In particular, with regads to group life, counsel argued that the evidence established simply that the reason that office employees did not get group life was because the insurers only provided coverage for warehouse employees. The differential was not on the basis of sex but was instead on

the basis of where the employee worked within the Company. With regard to Christmas bonuses, the Board was reminded that the evidence of Mrs. Newman was that while workers in the warehouse received the Christmas bonus, the bonuses were not paid in the office. Indeed, Mr. Petre lost his bonus when he moved from the warehouse into the office. Thus, again, it was said that the differential was based on the location of work rather than upon sex.

Further evidence which the respondent's counsel relied upon to show that Woolworth's did not have a sexist attitude towards women was the fact that Mrs. Crouse as a payroll clerk received a higher wage than the Assistant Personnel Manager, Mr. McLennan. Further, women were able to progress through the ranks towards managerial jobs. In 1982, the "women" in the office received increases of five to eight per cent whereas the "men in the warehouse" received increases of only up to five per cent.

With regard to any of the inconsistences between the respondent's witnesses, counsel for Woolworth's reminded the tribunal of the long delay between the laying of the complaint in 1982 and the timing of the hearings in the latter part of 1985. It was submitted that Mr. Delvecchio, who is no longer employed by the Company, has no reason to fabricate his evidence but may well not enjoy the best of memory given his new responsibilities. Further, the factor of Mr. Rosano's health ought to be considered in assessing his recall. In particular, with respect to Mr. Rosano's assertion that the office survey results were not available or completed at the time the decision to impose this freeze was made, counsel asked the tribunal to conclude that Mr. Rosano must simply have been mistaken about that in that he had also said that he had explained to the complainants why their salaries were being frozen on the basis of the survey. Thus, the tribunal was asked to accept Mr. Rosano as

making an honest mistake arising out of confusion because of his health condition.

In reply to the complainants' submissions that an adverse inference should be drawn from the fact that Mr. Andrews was not called to testify or that no clear witness came forward to explain the reason for the decision to impose the freeze, counsel for Woolworth's stressed that the need to provide an explanation only arises if a prima facie case is made out. It was stenuously submitted that no prima facie case had been established by the complainants. Alernatively, the Board should conclude that no one person actually made the decision to impose the freeze.

Finally, counsel for Woolworth's asked the rhetorical question of how it could be said that the respondent discriminated against women if 62 other female employees got an increase who worked in the same office.

With regard to the question of remedy, it was argued that if this Board were to award a five per cent increase to the complainants for 1982 and use this as the basis for computing losses in 1983, 1984 and 1985, this would effectively destroy the wage grid over those years that was created by the employer in order to erase the disparities which were the original cause of concern. Further, it would distort the actual increases that were given to the complainants in later years. Thus, it was submitted that if damages were to be awarded, it should only be for five per cent of the 1982 salaries.

With regard to damages for hurt feelings, the Board was reminded that no evidence was adduced with regard to the effect of the decision upon Mrs. Roach and her emotional state. Further, there was "very little evidence of suffering" with regard to the other complainants. It was

said that the purpose of the legislation was to provide relief and not to punish and that a $5,000.00 award of damages would appear to have a component of punishment. It was submitted that if damages were to be awarded, nominal damages would be sufficient in this case. Further, it was submitted that a "coerced apology" would be pointless and meaningless and thus ought not to be awarded against the respondent.

In response to the request for an order requiring "future co-operation" with the Commission, it was submitted that this would be unnecessary and inappropriate for this employer given the number of examples cited above which indicate that there should be no finding of the pattern of discrimintion by this employer. Finally, in responding to the request of a remedy by way of a letter of explanation to be provided to the complainants, it was submitted that this request ought to be considered as a concession that the respondent's action was not discriminatory. Arguing that the request creates an irony, it was submitted that if Woolworth's had acted in a discriminatory way and had intended to do so as alleged by the complainants and the Commission, there would be no need for a furher explanation to be provided to the complainants.

Counsel for all the parties relied extensively on case law and cited many authorities to the Tribunal. The relevant case law shall be reviewed in the next section.

THE LAW

The operative provision of the Code is section 4(1)(g) which reads:

4. (1) No person shall

...

> (g) discriminate against any employee with regard to any term or condition of employment.
>
> because of race, creed, colour, age, sex, marital status, nationality, ancestry, or place of origin of such person or employee.

When the hearing of this matter commenced and indeed up until the last day of argument, all parties had proceeded on the basis that the Commission and the complainants were under the obligation of proving or establishing intent on the part of Woolworth's to discriminate against the complainants. This requirement of proving intent arose from the Court of Appeal's decision in the Ontario Human Rights Commission vs. Simpson-Sears Limited (1982) 38 O.R. (2d) 423. In that case, the Ontario Court of Appeal had held that proof of intention to discriminate on a prohibited ground is essential to a finding that the Code had been contravened. However, on December 17, 1985, just two days before the final day of argument in the case at hand, the Supreme Cout of Canada rendered its decision on the appeal from the Simpson-Sears case which had been launched by the Commission. Ontario Human Rights Commission and Teresa O'Mally (Vincent) and Simpson-Sears Limited et al, unreported, Supreme Court of Canada File 17328, December 17, 1985. The Supreme Court's ruling has set to rest two important elements that are relevant to these proceedings.

The Simpson-Sears case arose because the complainant was required by her employer to work Friday nights and Saturdays as a condition of her employment. However, her religious convictions require a strict observance of the Sabbath from sundown Friday to sundown Saturday. She alleged discrimination on the basis of creed against her employer because of its requiring her to work on the Sabbath. The Divisional Court and the Court of Appeal had upheld the Board

of Inquiry's decision to dismiss the complaint. The issue before the Supreme Court was whether a working requirement that was imposed upon all employees for bona fide business reasons could be considered discrimination against the complainant because compliance required her to act contrary to her religious beliefs and did not so affect other members of the employer's staff. The Court held, at page 19, that:

> An employment rule honestly made for sound economic and business reasons and equally applicable to all to whom it is intended to apply, may nevertheless be discrimination if it affects a person or persons differently from others for whom it is intended to apply.

In coming to this conclusion, the Court looked at the purpose of Human Rights legislation. At pages 12 and 13 it was said,

> Legislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary - it is for the courts to seek out its purpose and give it effect. The Code aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator, rather to provide relief for the victims of discrimination. It is the result or the effect of the action complained of which is significant. If it does, in fact, cause discrimination; if its effect is to impose on one person or group of persons obligations, penalties or restrictive conditions not imposed on other members of the community, it is discriminatory. [emphasis added]

The Simpson-Sears case clearly establishes that the Supreme Court has accepted the concept of "adverse effect discrimiation" and defines this at page 17 as rules which "do not discriminate on their face but which have a discriminatory effect." Adverse effect discrimination is said to arise:

> ... where an employer for genuine business reasons adopts a rule or standard which is on its face neutral and which will apply equally to all employees, which has a discriminatory effect upon a prohibitive ground upon one employee or group of employees in that it imposes, because of some characteristic of the employee or group, obligations, penalties or restrictive conditions not imposed on other members of the work force.
>
> (Page 18)

The Supreme Court in the Simpson-Sears case also commented on "direct discrimination" and explains that this occurs "where an employer adopts a practice or rule which on its face discriminates on a prohibitive ground. For example, 'no catholics or no women or no blacks employed here.'" (Page 18)

The Supreme Court's decision in Simpson-Sears has also been significant in settling the question of the burden of proof in proceedings such as this. The Court held that the burden of proof is on the plaintiff to show direct or adverse effect discrimination:

> The complainant in proceedings before Human Rights tribunals must show a prima facie case of discrimination. A prima facie case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the asbence of an answer from the respondent employer. Where adverse effect discrimination on the basis of creed is shown and the offending rule is rationally connected to the performance of the job, as in the case at bar, the employer is not required to justify it but rather to show that he has taken such reasonable steps towards the accommodation of the employee's position as are open to him without undue hardships.... In this kind of case the

> onus should again rest on the employer for it is the employer who will be in possession of the necessary information to show undue hardship, and the employee will rarely, if ever be in a position to show its absence.
>
> (Pages 28 and 29)

Thus it is now clear that the onus is upon the complainants to establish a prima facie case of discrimination to the Board of Inquiry. However, the onus is on the employer, once the prima facie case has been made out, to establish that the conduct is rationally connected to the job and that the employer has taken reasonable steps to accommodate the employee.

Following from the Simpson-Sears decision and its discussion of the purpose of the Human Rights legislation, it is also instuctive to look at the consideration a previous Board of Inquiry gave to the purpose of the Code. The language is very applicable to this case. In Bell and Korczak vs. Ladas and the Flaming Steer Steak House, 1980, 1 C.H.R.R. D/155 (Ontario - Shime) at page D/156, the purpose of the Code was said to be:

> ... to establish uniform working conditions for employees and to remove those matters enumerated in section 4 as relevant considerations in the work place. Consideration of matters such as race, creed, colour, sex, marital status, nationality or place of origin strike at what the preamble of the Code refers to as "the foundation of freedom, justice and peace," and infringes on the "freedom of equality in dignity and rights" which this Province and this society revere as commonly held values and have enshrined these in the Code. Thus, the Code prohibits these values from becoming negative factors in the employment relationship... The evil to be remedied is the utilization of economic power or

> authority so as to restrict a woman's guaranteed and equal access to the work place, and all benefits free from extraneous pressures having to do with the mere fact that she is a woman.

In an attempt to recognize and apply the purposes of the Code to the fact situations before them tribunals hearing Human Rights cases have often commented on the difficulty of proving discrimination or for the tribunals in discovering discrimination. This is recognized in the decision rgarding Kennedy vs. Mohawk College Board of Governors, Ontario Human Rights Commission Board of Inquiry, (1973) (unreported) (Lederman) pages 4 and 5:

> Discrimination on grounds of race or colour are frequently practised in a vary subtle manner. Overt discrimination on these grounds is not present in every discriminatory situation or occurrence. In a case where direct evidence of discrimination is absent, it becomes necessary for the Board to infer discrimination from the conduct of the individual or individuals whose conduct is in issue. This is not always an easy task to carry out, the conduct alleged to be discriminatory must be carefully analyzed and scrutinized in the context of the situation in which it arises. In my view, such conduct to be discriminatory must be consistent with the allegation of discrimination and inconsistent with any other rational explanation. This, of course, places an onus on the person or persons whose conduct is complained of as discriminatory to explain the nature or purpose of such conduct. It should also be added that the Board must view the conduct complained of in an objective manner and not from the subjective viewpoint of the person alleging discrimination whose interpretarion of the impugned conduct may well be distorted because of innate personality characteristics, such as a high degree of sensitivity or defensiveness.

Thus, the Mohawk College case not only recognizes the difficulty of proving discrimination but also instructs Boards of Inquiry to analyze the alleged conduct in the context of all the circumstances which gave rise to the complaint. Further, it reminds Boards that the conduct must be viewed objectively in order to sort out true discrimination from the emotional effects of conduct which ought not to be considered breaches of the Code.

In assessing whether conduct is discriminatory, tribunals have not restricted themselves from finding violations of the Code to situations where discrimination is the only cause of the conduct which is the subject of the complaint. For example, in Hendry vs. the Liquor Control Board of Ontario, 1980 1 C.H.R.R. D/160 (Soberman), the tribunal considered how much or to what extent the complainant being a woman had been a factor in the employer's conduct. The tribunal concluded in paragraph 1458 that if being a woman was a "material cause", that is proximate cause, one that played a part even if subconsciously and even if present with other causes in the decision to terminate her employment, that would be sufficient to find a breach of the Code. That, even if the respondent's conduct is based only in part on considerations of the sex of employees, that may be sufficient to establish a breach of the Code.

Much of the complainants' arguments were based on allegations of different standards applied to the complainants and male employees and the allegaion of systemic discrimination. These concepts were dealt with in the case of Irene McDonald and Local 286, International Ladies Garment Workers vs. Knit-Rite Mills Limited, 1984 5 C.H.R.R. D/1949 (Manitoba). That case dealt with wage scales that had been set differently for men and women and that were enshrined in the collective agreement. The tribunal concluded that, as a

finding of fact, there was no rational explanation offered for the difference in the wage scales. The tribunal found such different standards to be a breach of the Human Rights legislation and an example of systemic discrimination. At page D/1962, it was said that this was a situation:

> ... in which different treatment of men and women occurred not as a result of the application of a standard or normative rule but rather, because different standards, in this case rates of pay, were applied to men and women... on the basis of sex.... In such cases, where the treatment of men and women clearly is differentiated without reasonable explanation by the employer or without the employer being able to bring itself within one of the exceptions prescribed in the Act, it is the discriminatory result which is prohibited....

Thus, if different standards are applied to men and women without any rational explanation being offered, this will create a discriminatory result which will be prohibited by the Code.

Two evidentiary matters are also of concern to this Tribunal which arise because of the way in which the case was presentd by both parties. The first is the question of similar fact evidence and its admissibility or weight in these proceedings. Extensive argument was addressed to the Tribunal at the outset of the proceedings as to whether the similar fact evidence which the Commission and the complainants wanted to adduce ought to be heard. At the time of those submissions, intent was thought to have been a requirement of proof of the complaints and the similar fact evidence was offered in support of the Commission's attempt to prove intent. Over the strenuous objection of counsel for the respondent, the Tribunal ruled that similar fact evidence was admissible on the issue of intent but that the evidence

would be given whatever weight would ultimately appear to be warranted at the end of the day. As noted above, the requirement of the proof of intent is no longer an issue in this case. The question that arises is what, if any, admissibility or effect should similar fact evidence have at this stage. The care to which a tribunal should assess similar fact evidence was well discussed in the case of The Flaming Steer Steak House, supra. That was a case of alleged sexual harassment. The tribunal there discussed that the general rules regarding similar fact evidence applied equally to criminal and civil cases and to inquiries under the Human Rights Code. The tribunal turned its mind to the landmark case on the issue which is Makin vs. Attorney General for New South Wales [1894] A.C. 57, 63 L.J.P.C. 41 where Lord Hershall stated:

> It is undoubtedly not competent for the prosecution to adduce evidence pertaining to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it is relevant to an issue before the jury and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment are designed or accidental, or to rebut a defence which would otherwise be open to the accused. The statement of these principles is easy, but it is obvious that it may often be very difficult to draw the line to decide whether a particular piece of evidence is on the one side or the other.

Thus, it is accepted that similar fact evidence is admissible in hearings under the Human Rights Code. But the evidence

must be relevant to an issue before the tribunal. While intent need not be proven as an element of the complainants' case, this does not mean that intent itself is an irrelevant consideration in proceedings such as this. Thus, similar fact evidence is still admissible on the question of intent and could thus be admissible in the case at hand. However, the tribunal is mindful of the fact that similar fact evidence cannot be considered admissible to show that a respondent "is likely" from a history of conduct to have committed the offence which becomes the subject of a later complaint.

The final evidentiary issue raised by counsels' arguments deals with the implications that ought to be drawn from the respondent's alleged failure to call a witness who took personal responsibility for the decision to impose the wage freeze by Woolworth's. There is no question that courts and tribunals have felt free to draw adverse inferences from the failure of a crucial witness to testify. In Northern Wood Preserves Limited and Hull Corporation (Shipping) 1969 Limited, (1973) 2 O.R. (2d) 335 (C of A) at page 336, the Court held:

> It is true that the failure of the defendants to testify cannot be used as a means of filling a gap in some part of the plaintiff's claim, but it renders much more easy the drawing of an inference where one or two have to be drawn.

Further, in Mudrazia vs. Holjevac, 1971 O.R. 275 (H.C.J.) the Court held:

> ... Failure of a defendant to testify does not constitute evidence where no case has been made out against him, but where a prima facie case has been made out the defendant's failure to testify may be the subject of an inference

> that his testimony, if given, would not support the defence raised.

Thus, a tribunal can draw an adverse inference from a party's failure to tender a witness. However, the tribunal is not entitled to draw that adverse inference unless and until a *prima facie* case has been made out against that party.

THE DECISION - APPLICATION OF THE LAW TO THE FACTS OF THIS CASE

It is small wonder that the complainants felt grievously wronged by the conduct of Woolworth's in the latter part of January, 1982. The function of this tribunal is clearly not to pass judgment on the employee relations practices *per se* of the respondent. But it must be observed that the decision to impose a wage freeze on six individuals in a work force of close to 300 is a delicate matter at the best of times. It is a particularly sensitive matter when the decision affects the three people who are charged with the responsibility of processing everyone else's wage increases and when all the six are long-term, capable and dedicated employees, who have earned greater seniority and exhibited greater loyalty to the company than many or most of the other employees. The management personnel who communicated the decision to the complainants did so in a particularly brusque, condescending and inflammatory way. No warning was given to the employees. Little if any explanation was offered. When further explanations were sought, rhetoric was offered that could not satisfy the complainants' desires to understand the decision on an intellectual, financial or emotional basis. The explanations offered to the complainants sounded hollow, unfounded and arbitrary. They were advised of surveys and studies that had apparently been conducted but that came as a complete surprise to the complainants at the time and which were not produced to the

complainants until these proceedings were well underway. Thus, the way the respondent conducted the task of informing the complainants of the decision to impose the freeze must be recognized as significant in that its very insensitivity prompted the complainants to wonder as Mrs. Crouse suggested "There must be a principle somewhere here." The complainants wondered how their salaries could have any significant effect on a wage budget involving millions of dollars. So the complainants concluded, from the hollowness of the explanations given to them as individuals and the fact that only women's wages were being frozen, that the "principle" must be that the employer was discriminating against them on the basis of their sex. They could see no other explanation.

But the function of this tribunal is to look at the situation objectively and not just from the viewpoint of the complainants as was pointed out by Chairman Lederman in the Mohawk College case, supra, at page 5. Thus, the entire context of the decision to impose the wage freeze and the effect of the decision-making process on the work force and the complainants must be addressed objectively. In that context, the issue thus becomes whether the decision to impose a wage freeze on the complainants was intended or was the result in any way of the complainants being women.

There is simply no evidence to support a conclusion that the respondent's decision could be classed as direct discrimination. No facts establish, nor could any reasonable inferences be drawn, to suggest that the employer decided to impose a wage freeze on the affected people because of their sex. The directive given to Mr. Rosano to freeze wages in certain office jobs that paid greater than $300.00 does not translate directly into a reading that only women's wages over $300.00 should be frozen. The facts do not support that. It is true that only women held those jobs that were the subject of the freeze, but that raises the question of

adverse effect discrimination and does not mean that there can be a finding of direct discrimination.

Drawing guidance from the Supreme Court of Canada in the Simpson-Sears case, supra, this tribunal must look for adverse effect discrimination here by asking whether the complainants have fallen victim to a practice or a standard which may appear neutral on its face and which could be said to apply to employees of both sexes, but which had a discriminatory effect on the female employees and that imposed a penalty or restriction upon their earning capacity because they are women that was not suffered by men.

It was suggested that the poor quality of the office survey compared to the warehouse survey created different standards for men and women because of the predominance of men in the warehouse and women in the office. However, this submission cannot be accepted for two reasons. First and foremost, while the evidence surrounding the office survey does create a striking impression of inefficiency and sloppiness in both form and substance, the results of the survey were proven to be accurate by the Commission's investigator, Ms. Bernhardt. Thus, it cannot be established that the manner of conducting the survey itself had a discriminatory effect or result upon the complainants.

Secondly, it cannot be accepted that there was one survey done for "the men" and another done for "the women". The warehouse survey covered the entire warehouse, which includes men and women. That survey produced information showing that some of the lowest paying categories in the warehouse which are staffed by women, such as cleaners, deserved to be upgraded compared to the competition. Thus, the warehouse survey cannot be accepted as a survey of men's jobs nor as adversely affecting women. The survey of the office functions did only cover females. The fact that the

positions are only held by females must, in fairness to all, be recognized as a result of generations of socialization that have channelled women into clerical, low-paying positions. That is clearly the result of discrimination. But that is societal discrimination and there is no evidence to suggest that it is a result of Woolworth's hiring or placement practices.

The important question regarding the conduct of the office survey is why it only covered women and why the survey did not seem to include the few male jobs in the office. These were the internal mail delivery person, the traffic co-ordinator and some of the rebuyers. The traffic co-ordinator job was one that Mr. McLennan attempted to survey but could find no equivalent among the competition. Yet, because of that attempt, it must be considered part of the survey. On the other hand, it is clear that the internal mail delivery position was never considered part of the survey because it was either thought of as a predominantly warehouse job or is outside the scope of the problems the survey was designed to address, i.e. the intenal wage disparities. While there is a suggestion that this was a warehouse job, the internal mail delivery job was considered part of the office for payroll purposes and the person holding that job believed it to be such. The survey would have assisted in evaluating market comparability. Yet, a survey could not have assisted in equalizing any wage disparity with this position because it was unique in the operation. With regard to the rebuyer, that position could be accepted as the respondent suggests to be managerial because of their independent authority to commit funds and thus to be outside the scope of the survey. This is borne out by the fact that this category was not included in either the warehouse or the office surveys as were no management positions. But what is most important and what must be remembered is that both males and females held the position

of rebuyers. Therefore, of the three possible categories of jobs that are suggested to be significantly absent from the survey, one was found to be included in the survey, i.e. traffic controller; one was staffed by men and women and is probably a managerial position, i.e. the rebuyers; and only the third, the internal male delivery job, seems to be lacking in a persuasive reason for its exclusion in the office survey.

If the structuring of the survey could be accepted as the factor that resulted in a policy that only affected women's wages, it could possibly lead to a finding of adverse effect discrimination. But on the basis of these facts, it cannot be said that men were excluded from the survey. On the contrary, men's positions were either attempted to be surveyed or were excluded with other managerial positions in the one case where it is staffed by both sexes. The one exception, the internal mail delivery job, taken in the context of the whole of the office and the warehouse surveys, does not suggest that the scope of the survey created a criteria which had a discriminatory effect on the female employees in the office because of the fact that they are females.

In any event, for the complainants to succeed with this case, they must first establish a prima facie case of discrimination. As stated above, the facts simply do not support a finding of direct discrimination. As recognized in the authorities cited above, discrimination is a difficult evil to prove because of it subtlety and insidious nature. Undoubtedly, that is why the Supreme Court of Canada accepted and applied the concept of adverse effect discrimination in the Simpson-Sears case, supra, and thereby opened the door to findings of discrimination without a requirement of the proof of intent. But to make out a prima facie case here, the complainants must show that their allegations, if accepted as

true, are complete and sufficient to justify a verdict in their favour in the absence of an answer from the respondent. So leaving aside the rspondent's explanations (or lack thereof as alleged by the complainants) for the moment, the question must now be faced as to whether the complainants' allegations on their face make out a prima facie case of discrimination on the basis of sex. The complainants need not show that sexual discrimination was the only factor in the decision to impose the freeze upon them, only that it was a factor at all. See Hendry v the Liquor Control Board of Ontario, supra.

Whether addressing a question of prima facie proof or if called upon to assess the relative merits, the issue of the complainants' believability is not difficult. Their evidence can be and has been accepted by this tribunal as completely credible and trustworthy. So wherever it differs from the respondent's evidence on issues of fact (vis-a-vis emotions or reactions) the complainants' evidence is accepted as establishing those facts. Thus, taken at its best, the complainants were told at the end of January, 1982 that six women out of a work force of 292 employees were having their wages frozen. This created an immediate reaction of perceived unfairness and discrimination. But the complainants' case also establishes that of the entire work force virtually all the others got raises including many women. Viewing this objectively in the context of the work place and the labour market, wage freezes per se are recognized as not infrequent occurrences. The complainants were the highest paid employees included in the office survey. Can it be said that the decision had a discriminatory effect on the complainants and that they were penalized because of the fact that they are women? The answer must be that the complainants were discriminated against in that they were treated differently by being denied the raise. But the evidence does not establish that they

were treated differently because of their sex. The complainants' case fails to make out, directly or inferentially, the necessary causal connection between the fact they were denied the raise and the fact that they are women. The difference between these complainants and the complainant in the Simpson-Sears case is, that in the latter case the complainant was able to show that the corporate policy affected her because of her religious beliefs. The complainants in the case at hand cannot make that same connection on the basis of sex.

To say that only women were denied a raise does raise a perception of discrimination. But that initial perception does not survive the consideration that over fifty other women received raises in the same office. Further, an inference of discrimination on the basis of sex is not the only possible explanation that could be accepted on the basis of the complainants' evidence because their case establishes large wage disparities in the office itself plus the fact that they were the highest paid employees in the office and among the competition. Notice can be taken of the fact that wage freezes are not uncommon. Further, freezes often occur in some but not all jobs in a personnel unit. The freezes are usually imposed on the highest paid employees. A wage freeze in that context, while it may be a drastic and ultimately a counter-productive tactic, can be the result of financial reorganization, internal restructuring and market sensitivity quite apart from discrimination. Therefore, it cannot be accepted that the decision to freeze these particular wages raises an inescapable suggestion of discrimination as would be required to make out a prima facie case. Nor can it be said that the freeze in these circumstances is "sufficient and complete" to justify a verdict in their favour.

The complainants further contend that the discrimination created by the freeze is consistent with a pattern of discrimination against women in this work force. First, it must be remembered that the similar fact evidence cannot be used to show that the respondent is likely to discriminate on the basis of sex in 1982 because it may have discriminated in the past. The evidence can only assist the complainants to rebut a defence or to prove intent. But the evidence regarding the Christmas bonuses does not establish discrimination. No one in the offices, be they male or female, received the bonuses prior to 1975. The evidence on group life insurance does show differential treatment for warehouse and management staff as compared to the office employees. Then, exceptions were made when men from the warehouse moved in the office and kept their insurance benefits there. The warehouse benefits were simply 'red-circled' as were the salaries. But again, this establishes only that different policies were applied to different locations. The fact that the staff positions were occupied by one sex cannot in itself establish a discriminatory result or effect. Thus, this evidence was short of establishing discriminatory patterns.

But even if the group life insurance issue were accepted as discriminatory conduct, which it is not, it can only be of assistance in proving intent or rebutting a defence once a prima facie case is made out of the discriminatory action. Unless and until the prima facie case is made out, this evidence can have no weight.

On the basis of all the above, it cannot be concluded that the complainants have made out a prima facie case of discrimination even though their case and allegations are accepted as complete. Having reached that conclusion, it is then neither necessary nor appropriate to comment on the

sufficiency or the consistency of the respondent's evidence because unless a prima facie case is made out, the respondent is not called upon to answer the complaint. Thus, this tribunal is not called upon to judge the answers offered by the respondent.

In conclusion, the respondent has treated the complainants differently from its other employees by denying them a raise in 1982. From a human standpoint, the way the respondent handled the matter at the time created a well justified feeling of unfairness and discrimination in the minds of the complainants. They could see no other explanation for the conduct than that it was motivated by or the result of discrimination. But viewed objectively, and outside the perspective of the complainants and their situation, the employer's conduct in imposing a wage freeze on the positions does not lead to a finding of discrimination on the basis of sex. Nor does the evidence link the decision with a reason based on sex. To be contrary to the Human Rights Code, the respondent's conduct must be based on a prohibited ground. In this case, the allegation was that of sexual discrimination. But, the complainants were unable to establish on the evidence that they were denied the raise "because of their sex" as is prohibited by section 4(1)(g) of the Code. The complainants were only able to show that they were treated differently and that they are all female. This is not enough to satisfy the requirements of the Code. Thus, the complaint must be dismissed.

Finally, I wish to thank all counsel for their able assistance throughout this long case. The amount of preparedness and thought that all counsel exhibited on behalf of their respective clients' interest were invaluable in ensuring a complete and thorough hearing of all the important and interesting issues raised by this case.

DATED at Toronto, this 17th day of January, 1986.

Chairman